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IN THE

Supreme Court of the United States

October Term, 1968

No. ~~899~~ 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

MOTION OF 230 PACIFIC NORTHWEST SHIPPERS TO AFFIRM

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METROPOLITAN PRESS — SEATTLE, WASH.

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MOTION TO AFFIRM

Pursuant to Rule 16 (1) (c) of the Rules of this Court, 230 Pacific Northwest Shippers move that the judgment of the District Court be affirmed on the grounds that it is clearly correct and that the question presented is factual and warrants no further argument.

This motion is on behalf of 230 Pacific Northwest Shippers and shipper organizations who are fully identified in the record in the Commission and also in the District Court. These shippers and shippers' organizations

are, as the Commission noted, "located mostly in Washington and Oregon" (App. 268)[1] with branches or operations in all Mountain Pacific territory and in British Columbia, Alaska and Hawaii. The scope and interest of these shippers may be capsulized as follows:

13 Associations of Shipping Groups or Ports
30 Potato, Onion or Fresh Fruit & Vegetable Shippers
55 Wholesalers, Jobbers, or Distributors
5 Lumber or Related Product Shippers
12 Clothing Manufacturers
17 Department Store or Retail Chains, etc.
5 Peat Moss Shippers
6 Evergreen or Christmas Tree Shippers
16 Fish or Fish Product Shippers
36 Furniture or Mattress, etc., Manufacturers
35 Miscellaneous Manufacturers in the Northwest and West

230 Total Shippers and Shipper Groups[2]

QUESTION PRESENTED

The "question presented" by the government involves the substantiality of the extensive evidence offered by

1. For convenience "App." will be used to refer to the separately printed Appendix to Jurisdictional Statement of the United States which contains the opinion of the District Court and the reports of the Commission.

2. Those 230 listings cover the very important Whatcom County Traffic & Rates Bureau, the Port of Bellingham and the Bellingham Chamber of Commerce, so vitally interested in freight rates to and from Northwest Washington. It covers three major pool car shippers' associations; the Port of Pasco with its giant Big Pasco warehousing complex at Pasco, Washington; the Northwest Fisheries Association; as well as the Washington Potato & Onion Growers & Shippers Association and the Northwest Furniture Manufacturers Association, among many others. The six shippers' associations alone ship over 16,000 carloads of freight a year (Ex. 103).

these shippers and many others concerning the public benefits that will result from this merger as now conditioned. The question as stated by the government is:

> "Whether the Interstate Commerce Commission's approval of the merger of the Great Northern and Northern Pacific railroads and their railroad subsidiaries is supported by a convincing showing that benefits to the public interest outweigh the elimination of substantial rail competition in the Northern Tier of the United States." (J.S.2)

This clearly does not raise a new or significant legal issue for this Court. It simply questions the facts and findings about public benefits and misdescribes the competitive result in an attempt to have this Court undertake to reweigh the evidence. The evidence plainly shows that this merger with its carefully shaped conditions does far more than meet the statutory test of being consistent with the public interest; it very substantially furthers and promotes the public interest.

STATEMENT

These 230 shippers and shipper organizations have actively participated in this case, with their own witnesses and counsel, since April 2, 1962. From that time until July 1966, we strongly supported the merger of the applicants but firmly opposed them in their resistance to certain conditions sought by the Milwaukee Road. During that period the position of these shippers was not the same as that of either the applicants or the Milwaukee. However, in July 1966, following the initial decision of the Interstate Commerce Commission, the applicant lines asked the Commission to reconsider its decision and at that time they adopted what has essentially been the

position supported and defended by these shippers since 1962.

Accordingly, in October 1966 these shippers independently, but joined by many other parties, strongly urged the Commission to reconsider and reverse the initial decision (App. 268). The Commission proceeded "to reexamine each and every issue of substance and to weigh carefully every potential advantage and disadvantage that may reasonably be expected to result from the proposed unification" (App. 273). As the District Court noted (App. 18-19, 22), the Commission reconsidered the benefits to shippers and concluded:

> "Like the many shippers who support the applicants and who do business in the said States, and like the numerous States, State and Federal agencies, communities and shipper groups which have dropped their opposition and now favor the merger, we see this transaction as a means for achieving, through appropriate conditions, overriding benefits to the public through improved transportation." (App. 344)

From the outset we have agreed with the Commission that there is no legal presumption that a merger or merger conditions are justified. For that reason we entered the case with counsel and witnesses to represent and demonstrate our needs.[3]

Nearly 300 other individual shippers and receivers of freight testified at the hearings held in sixteen cities in this area of the nation. The record includes over 15,000 transcript pages and 240 exhibits.

The hundreds of shippers who testified and partici-

3. See the transcript at pages 7097-7217 and Exhibit No. 103, pp. 1-48.

pated overwhelmingly support this merger. That support increased after the applicant lines agreed to conditions for the Milwaukee and North Western because of the increased public benefits that those conditions will produce. The position of the Department of Justice conflicts sharply, for example, with that of the Department of Agriculture which said that this merger as conditioned will produce "considerable benefits . . . to the agricultural community." The Department of Agriculture, unlike the Department of Justice, is a very large shipper. The other large government shipper, the Department of Defense, in no way opposes this merger, and the Commission found this "merger will provide . . . an increased capacity to serve the national defense" (App. 311).

The District Court pointed out (App. 15) that "The benefits of merger to applicants, to shippers and to the general public were enumerated" by the Commission. A summary of the specific shipper and public benefits and findings concerning their importance are in the Commission's Second Report (App. 305-311). A glance at that portion of the report will readily show why the District Court correctly held that the various "contentions against the merger do not override the benefits, including savings and better service . . ." (App. 6). At another point in this motion we will summarize the extensive facts and findings that show the important and far-reaching benefits to shippers and the general public.

In asking this Court to reweigh what is obviously substantial and detailed evidence, the government (speaking only on behalf of the Department of Justice) restates the facts in a fashion that conflicts with the evidence

and the findings. A few examples of the government's erroneous statements will suffice:

1. The government attempts to brush aside the Seaboard-Coast Line case[4] by stating to this Court that the Milwaukee is the "Northern Lines' only rail competition" (J.S. 18). That statement is amazing to shippers. The strong Union Pacific handles over 25 per cent of the east-west rail traffic to and from the Pacific Northwest and is highly competitive in terms of service and rates (App. 146; Tr. 7194-7195). The statistics used by the government are artificially limited to traffic moving "between the Northwest *and the Twin Cities*" (J.S. 24; emphasis added). By that narrow definition it ignores the traffic of railroads that very effectively compete for the same east-west traffic but that do not physically transport it through the Twin Cities.[5] Obviously more important here is the fact that the largest city at which this merger would have eliminated rail competition was Billings, Montana, with a population of about 58,000. Now, however, the conditions guarantee that this will not happen, for the Milwaukee will also serve Billings. This is a far better result from a shipper service standpoint than the *Seaboard-Coast Line* case. There rail competition was eliminated at Tampa, Florida, with a population of about 300,000.

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4. *Florida East Coast R. Co. v. United States*, 259 F. Supp. 993, affirmed *per curiam* 386 U.S. 544.

5. After the merger the Pacific Northwest will have four strong direct-route services: (1) The merged company's lines; (2) Union Pacific System; (3) Milwaukee Railroad Lines; and (4) Southern Pacific direct to large Oregon areas. Also there are three other transcontinental routes at competitive through rates: (1) Canadian Pacific–Soo Line routes via Canada; (2) Southern Pacific routes via Portland; and (3) Western Pacific routes including Santa Fe via Bieber, California.

After this merger the Pacific Northwest will have more competitive rail routes than the Commission and the Court have approved for the eastern and southern areas of the nation.[6] Morever, with the prescribed conditions that will create new east-west and north-south rail competition, this merger, as the Commission held, "presents an entirely new perspective for intramodal competition in the efficient and economical movement of transcontinental, western and Pacific Coast traffic" (App. 331).

2. The government states that the Commission simply considered the competitive effects of this merger on a "systemwide" basis (J.S. 12). This wrongly implies that intramodal and intermodal competition in the Northern Tier of States was slighted or not considered. The District Court recognized the Commission had done this "in detail" and "at length" (App. 15, 22). The Commission discussion cited by the government actually proves (App. 316-319) that the Commission reviewed the situation in the Northern Tier *separately*, and then together with, the entire system. (For example, in the table at App. 316 compare Column A which concerns the Northern Tier with Column B which concerns the entire system.)

3. The government misdescribes the facts and findings on the vigorous and ever-growing intermodal competition. These 230 Pacific Northwest Shippers themselves presented evidence of: the diversion of freight from rail to other modes, the competitive truck routes and intercoastal barge routes used, the new super highways, the competitive effects of the private or exempt truckers, the merging of truck lines to offer coast-to-coast service, the

6. See preceding footnote.

rail freight rate cuts to meet barge and truck competition, and comparative rail-truck transportation costs (Ex. 103, pp. 8-26). The District Court even cited some examples of what the shipper evidence revealed about truck competition on every type of traffic:

> "Numerous witnesses, principally shippers, described substantial incursions by motor carriers into railroad traffic in paper products, steel, cement, fruit, grain, *et cetera*. See, *e.g.*, Tr. 5754, 11836, 9527, 7224, 8023, respectively." (App. 35)

> "Shipper testimony revealed a wide range of reasons for the switch to motor carriers—lower costs, better service, more flexible routing, faster delivery. The manner in which trucks have managed to undercut the railroads in one or another facet of almost every sub-market illustrates the fungibility of rail and motor transport." (App. 36)

The Commission and the District Court pointed out that the truck competition is not only intense but also aggravates the long-standing problem of imbalanced east-west rail traffic in this area of the nation (App. 12, 253-254).

4. The government does not mention the service and rate handicaps that currently disadvantage shippers in the Northwest. Nor does it discuss how this merger and its conditions will remove handicaps, create competition and directly improve our position. Instead the government calls the benefits "the conventional benefits of any such combination of competitors—savings to the parties and some operational efficiencies" (J.S. 17). Surely it is not "conventional" for the applicants to increase their annual net income by $40 million before federal income taxes – twice the savings involved in the *Seaboard-Coast Line* case. Surely it is not "conventional" for the

Milwaukee Road to receive an added $15 million in freight revenues or to reach important new points such as Portland or Billings and become a new competitor from California to Canada. Surely the government's language cannot override the facts and findings showing that the faster and more dependable single-line service is "extremely important" to the shippers (App. 305). Surely it is not "conventional" for shippers to save thousands of dollars on switching charges or to break through historic market barriers.

In the following section we outline some of the public benefits of this merger that the government would brush aside.

The "factual" statements of the government, even if they were not wrong and misleading, do not raise a legal issue for this Court to review. As the District Court unanimously held, "The Commission in its Second Report evidenced an understanding of the governing guidelines" (App. 22). It carefully applied the Transportation Act and the decisions in *McLean Trucking Co. v. United States*, 321 U.S. 67; *Seaboard Air Line R. Co. v. United States*, 382 U.S. 154; *Florida East Coast R. Co. v. United States*, 259 F. Supp. 993, affirmed *per curiam* 386 U.S. 544; and *Penn Central Merger* cases, 389 U.S. 486. What the government is asking this Court to do is substitute its judgment for that of the Commission. The "question presented" is wholly unsubstantial; and the public should not continue to be denied the benefits of merger by further unwarranted delay.

ARGUMENT

Shipper and Public Benefit from Merger and Increased Rail Competition

The District Court was plainly correct in upholding the Commission. We have pointed out how the government erroneously and misleadingly redescribes the facts and findings in inviting this Court to reweigh the evidence. In our briefs to the Commission and the District Court we set out the 35 reasons why this merger would benefit shippers and the public. The Commission explained the public and shipper benefits at length (App. 305-311). Now the government would dismiss the facts and findings as constituting "conventional benefits." That characterization could hardly be more contrary to the facts and findings. We will briefly summarize some of the shipper and public benefits (1) created by the merger of applicants and (2) added and multiplied by the conditions for the Milwaukee Road.

1. Shipper and Public Benefits from Merger of Applicant Lines.

(a) Additional routes and enlarged stopping in transit.

The result as the Commission explained is to remove barriers and open new markets and sources of supply:

> "Shippers would have the benefit of additional routes over New Company's lines in any combination with intermediate junctions opened to form crossover routes between the Northern Lines, and between those roads and the Burlington at Billings and Sioux City. These are routes which have historically been closed to retain to each of the Northern Lines its long haul. The resulting wider choice of routing increases such attendant shipper benefit

as transit, partial loading and unloading, and diversion and reconsignment. The expansion of transit privileges benefits producers and processors of numerous commodities important to this area, including lumber, grain, feed, fertilizer, and iron and steel, and ingredients and products made from those commodities. Here, again, the benefits from the opening of the various gateways to the Milwaukee and the North Western multiply, not only from the competitive standpoint but from the standpoint of actual service to shippers and the elimination of artificial barriers to the development of new markets, services, and sources of supply." (App. 308)

(b) Faster and more dependable freight schedules.

The merged lines will use the shortest and best routes of all four railroads (App. 306). For example, the applicants' best general freight service time from Seattle will be cut by about 11¾ hours to Chicago and by about 20 hours to St. Louis. Despite the government's generalized references to "conventional benefts," the Commission properly found the faster and more dependable service is "extremely important here in view of the long distances involved and the nature of the products of the Northwest" (App. 305; and see Examiner's Rep. 149-156). The present, limited expedited freight service should also improve (App. 467-468).

The availability of alternate routes for applicants, especially across the Cascade and Rocky Mountains, will reduce the "wash-out" delays of today, reduce rail traffic congestion and reduce damage and market decline claims (App. 307, 309). Time is gained and dependability increased by the elimination of interchanges and concentration of car weighing and grain and federal car inspection.

(c) Automatically reduced rates and charges.

Non-competitive carload freight (for example, from Wenatchee) to an NP industry generally pays a non-competitive switch of about $12.00 per car (Ex. 103). Thousands of such switches are assessed each year in this area. This merger will eliminate all non-competitive switches between all GN, NP, PC, SP&S, and Milwaukee industries (App. 310).

Log, grain, wood chips, sand and gravel, and other carload rates apply only over one line in the Northwest in many cases. This will make all points on all merged lines (GN, NP, SP&S, and Pacific Coast) a "one-line" rate if merger is approved. These lower "one-line rates" will replace the higher combination rates which apply now on such through traffic between the GN and NP, etc.[7]

(d) Shipper benefits from applicants' savings.

A $40 million per year savings (or increase in net income before federal income taxes) is a huge reduction in operating costs. It is twice as large as the savings in the Seaboard-Coast Line merger. Our testimony showed the direct relation between the railroads' costs and their rate levels (Ex. 103, pp. 7-8). The Commission considered the matter and said, for example:

> "Thus, applicants' ability to operate more efficiently and at lower cost should be reflected in the service and rates afforded shippers and receivers." (App. 305, 305-306)

The merger savings per year will equal the effect of

7. See App. 309-310: "Shippers now utilizing the service of more than one applicant in joint-line movements will derive benefits from generally lower single-line rates . . ."

about a 20 per cent freight rate increase. The merger can thus offset millions of dollars of future shipper expenses or be a basis for freight rate cuts. In the last 17 months there have been three railroad cost-oriented general rate increases that shippers have been forced to pay and bear (I.C.C. *ex parte* 256; *ex parte* 259-A; *ex parte* 259-B).

(e) Increased and better car supply.

Car supply is a chronic problem in the western part of the nation. The Commission found:

> "Through the faster turnaround time made possible by shorter routes and facilitated terminal handling, it is anticipated that 639,097 car days (the equivalent of 1,750 cars daily) would be saved, with a savings of 61,555 car days merely through the elimination of duplicate reserves (held on shippers' orders) at 14 of 36 points served by more than one of the applicants." (App. 309)

With respect to the benefits of pooling all the equipment on the four lines, the Commission noted that "boxcar requirements reach their peak at different times on applicants' lines, but so close that one is reluctant to release cars to another" (App. 309). Also, Eastern railroads will have to return empty cars to the merged lines much faster now under AAR rules because of direct connections at Chicago, Peoria, St. Louis, and Paducah (App. 309).

New cars needed now to better serve customers are generally purchased only when railroad business is good. The new company, because of greater earning ability, will be able to buy them when needed without being so predominantly dependent on current earnings. Better

equipment means less loading and unloading and car service costs for the shipper when he has to make old or delayed equipment "do" when adequate new rail equipment is needed.

(f) Shipper savings in clerical and other costs.

The shipper's time is money to him. With merger one call will trace or place a car order or divert a car order where three or more calls are required today to separate railroads (App. 310). Concentrated traffic department headquarters will speed rate traffic matters. One call and one meeting can replace two or three calls and negotiations now. As all railroads make their rates by bureaus (under anti-trust exemption), this will not affect competition but will speed up the rate publication process. By merger, one switch crew, not two, will switch plants on the merged line. This will eliminate plant loading track disruptions where one line has followed the other in.

(g) Improvements in cities.

The consolidation of certain separate passenger depots and other changes such as the construction of a new railroad overpass viaduct in Spokane will produce real estate and street benefits:

> "Elimination of duplicate facilities at some common points would release desirable real estate for productive development, and various communities, particularly Spokane, would benefit by elimination of or substantial reduction in street hazards and congestion." (App. 310)

If the merger is approved, millions of dollars in new construction in bridges, terminals, etc., will commence.

For example, new rail yards will be constructed at Spokane and Seattle (App. 306-307).

(h) The public will benefit from railroad employees guaranteed jobs and monetary benefits.

The adverse effects on employees that affected the Commission's first decision have been removed. Employees will now receive positive benefits, more than even job-opportunity protection (App. 323-328). The employees now will receive guarantees and job assurances for the rest of their working lives (App. 326).

As the Commission said on this point:

> "We believe that the effect of attrition protection for all employees of the merged system will tend toward greater efficiency and higher morale among the employees and will thereby promote the national transportation policy in the development and maintenance of an adequate and effective transportation system." (App. 327)

The Commission later pointed out:

> " . . . the salutary effects of the employee protective agreements (described in the reconsideration report) upon the employees themselves and upon the economy of their localities. Employment is largely guaranteed. No employee will lose his job or be placed in a worse position with regard to his employment as a result of the merger. Protection is also extended to persons on furlough or leave of absence. Elimination of redundant jobs will occur over a period of time and will be solely by normal attrition, i.e., resignation, retirement, death or discharge for cause; . . . " (App. 468)

2. Conditions for Milwaukee Road Increase and Multiply Shipper and Public Benefits.

Abundant evidence proves the correctness of the Commission's finding that: "By virtue of the conditions being

imposed here for the benefit of other railroads, particularly Milwaukee and North Western, those carriers will not only benefit in their own interest as railroads but will be in a position to pass on the benefits so realized to the shippers and areas they serve" (App. 310-311). The contrast between the effects of denial and approval of merger is striking:

> "Denial of the applications for the purpose of preserving competition between the Northern Lines would merely perpetuate the existing dominance of the GN and NP in the northern tier, with the Milwaukee, despite shorter routes and superior grades, left to its comparatively small share of the market. *Preservation of the competitive status quo would, in our view, relegate the Milwaukee to an increasingly marginal and deteriorating role.* On the other hand, a properly conditioned merger, with NuCo competing against a strengthened Milwaukee, will serve to enhance rail competition, achieve a more desirable competitive pattern, while at the same time conferring substantial benefits upon the shipping public throughout the territory involved in this case." (App. 321; emphasis added.)

(a) A better Milwaukee Road for shippers.

Shippers will get a strong and vibrant Milwaukee Railroad serving the West on a fully competitive basis. It is absurd to belittle the improvements and elimination of historic barriers as "conventional." The conditions will increase Milwaukee's revenues by $15 million per year, open vast new traffic potentials in California, Oregon, and British Columbia, due to promised new trackage routes into Billings, Portland, and Sumas (Canada). It will have the ability to build more cars and do a better railroading job than it is doing or can ever do under the status quo.

(b) Access to Portland and Sumas: A new east-west and north-south railroad.

The trackage rights for Milwaukee to Portland will create a Portland gateway with the Southern Pacific and the Union Pacific and the merged lines. This will enable through rates and routes from and to the Columbia Basin, Whatcom County, and other places to California, Arizona, etc., with good service that is almost non-existent today. The Milwaukee will have trackage rights over the merged company's fast, direct route to the Milwaukee's Canadian gateway at Sumas. Today Sumas service involves intolerable delays and three interchanges over a slow, circuitous route. Whatcom County and Northwest Washington will benefit tremendously by lower rates, through rates, and fast service. The new Sumas route will also vastly improve service to New Westminster, Vancouver, and the Fraser River Delta area.

Canadian service will be better and more competitive than it is today. The Province of British Columbia supports the proposed merger (App. 268) and fought hard to get the Sumas gateway condition.

As the Commission found:

> "Thus, the Milwaukee, by reaching Portland directly, will be a rate-making transcontinental railroad, not only on traffic moving across the northern tier, but to and from California as well. Likewise, the Sumas condition will allow the Milwaukee to provide rail competition on traffic to and from Canada." (App. 311)

(c) Elimination of non-competitive switch charges at Milwaukee Road locations.

Responsible shippers often do not locate plants on the Milwaukee because of the non-competitive switching

charges at many points. (See our evidence, Ex. 103, p. 35, and the Commission's observations, App. 112-113.) Merger conditions will eliminate all non-competitive switching charges at all Milwaukee points of interchange. This will save from $12.00 to $19.00 (and more) per car for shippers on the Milwaukee today who have non-competitive traffic. This saving will run into hundreds of thousands of dollars per year for shippers. We believe the Union Pacific will follow suit voluntarily to remain competitive from its points. That will add to the shippers' savings.

(d) Opening the Spokane gateway and 10 other new transcontinental gateways: New flexible routing and markets.

The conditions will open 11 new reciprocal transcontinental gateways west of Minneapolis with the Milwaukee Road plus two with the North Western (at Oakes, North Dakota, and Crawford, Nebraska). This "will give many shippers a realistic choice of railroads for the first time in history" (App. 311):

> "Not the least of the benefits thereof will be the opening of new markets, transit points, and sources of supply for shippers and receivers located on applicants' lines who cannot now reach points on the Milwaukee not served by applicants, and those located on the Milwaukee to whom applicants' lines are now closed. The same purposes, on a smaller scale will be served by opening two gateways to the North Western at Oakes and Crawford." (App. 311)

From "the standpoint of actual service to shippers" these gateway conditions will "multiply" the new markets and sources of supply opened by the merger of applicant lines (App. 308).

(e) Billings can be a stop-off on Milwaukee routing. The merged lines will give the Milwaukee full rights into Billings. This will enable shippers to serve Billings on many stop-off cars that cannot do that today (App. 307). It will help Milwaukee shippers to serve their customers better.

* * *

All these benefits to the Milwaukee Road and its shippers are in addition to those documented in the pending Milwaukee-North Western merger proceeding. Only the merger of the Northern Lines can put the Milwaukee into Portland, etc. The merger conditions will make the Milwaukee a tremendous railroad, fully able to compete. A Milwaukee-North Western merger will add more benefits.

CONCLUSION

The evidence and findings concerning shipper and public benefits show why this conditioned merger is, as the Commission held, "entirely consistent with the public interest" (App 344). The shippers and the public should not be denied those benefits by further unwarranted delays. The District Court was clearly correct and its judgment shoud be affirmed without further argument.

Respectfully submitted,

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